Editor's note: Reconsideration denied by order dated Dec. 5, 1980

EDITH SZMYD
BEULAH HOTH

IBLA 80-740, 80-741 Decided September 15, 1980

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting native allotment applications F 14367 and F 14427.

Affirmed.

1. Alaska: Native Allotments--Applications and Entries: Amendments

   Where lands sought in a native allotment application are described by metes and bounds despite their having been previously surveyed, and thereafter an amended application is filed subsequent to December 18, 1971, seeking lands in a different township, the amended application is properly rejected as untimely.

2. Alaska: Native Allotments--Applications and Entries: Generally--Mineral Lands: Determination of Character of

   To establish the mineral character of lands, it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end. The mineral character of land may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable. Lands containing mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money with a reasonable expectation of developing a paying mine are disposable only under the mining laws.

APPEARANCES: Walter P. Zulkoski, Esq., Alaska Legal Service Corp., Fairbanks, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Edith Szmyd and Beulah Hoth separately appeal from decisions dated May 14, 1980, wherein the Alaska State Office, Bureau of Land Management (BLM), rejected their applications for native allotment, F 14367 and F 14427, respectively, for the reason that the land sought is mineral in character, and as such, is not subject to selection for native allotment. As the same issues are present in each appeal, we have, sua sponte, consolidated these appeals for consideration.

Application F 14367 was filed by Szmyd on September 29, 1971, for 160 acres of land described by metes and bounds, but which land was actually surveyed land described as S 1/2 SE 1/4 sec. 12, W 1/2 NE 1/4 sec. 13, T. 1 N., R. 2 W., Fairbanks meridian, Alaska. The applicant indicated use and occupancy of the land from 1950 for fishing, farming, and berry picking.

Application F 14427 was filed by Hoth on October 27, 1971, for 160 acres of land described by metes and bounds. As in F 14367, this land was actually surveyed land, described as E 1/2 NE 1/4, E 1/2 SE 1/4 sec. 13, T. 1 N., R. 2 W., Fairbanks meridian. The applicant indicated use and occupancy of the land from 1958 for camping and berry picking.

The applications had been filed pursuant to the Act of May 17, 1906, 43 U.S.C. § 270-1 (1970). This allotment act was repealed by section 18, Alaska Native Claims Settlement Act, December 18, 1971, 43 U.S.C. § 1617 (1976). Allotment applications pending on December 18, 1971, were protected in accordance with the provision of the statute which provides that "[n]otwithstanding the foregoing provisions of this section, any application for an allotment which is pending before the Department of the Interior on the date of enactment of this Act may * * * be approved * * *."

By memorandum of March 29, 1972, the Realty Office, Fairbanks Agency, Bureau of Indian Affairs, advised BLM that the descriptions on original applications F 14367 and F 14427 were in error and should be amended as follows:

> Szmyd, F 14367: S 1/2 SW 1/4 section 12, N 1/2 NW 1/4 section 13, T. 1 S., R. 3 W., Fairbanks meridian.
>
> Hoth, F 14427: S 1/2 NW 1/4, N 1/2 SW 1/4 section 13, T. 1 S., R. 3 W., Fairbanks meridian.

[1] An instruction issued October 18, 1973, by the Assistant Secretary, Lands and Water Resources, provided pertinently:

> Amendments to Application
>
> All amendments to allotment applications must be closely scrutinized. Amendments which result in the relocation of the allotment will not be accepted unless it appears that the original description arose from the inability to properly identify the site on protraction diagrams. Amendments which are designed to claim the commencement of the use and occupancy at an earlier point in time must also be carefully examined and the applicant must establish the reason for the error, his good faith in making the correction, and the applicant must present convincing evidence of the actual use and occupancy at the earlier point in time. (Emphasis added).

In each of these cases, appellant seeks an allotment for entirely different lands from those sought before repeal of the allotment act, December 18, 1971. It has not been shown in either case that the reason new lands were applied for was an inability to properly identify the occupied parcel in the original application. As the lands had been surveyed before the filing of the original applications, the error in description could not have arisen because of an inability to properly identify the sites on a protraction diagram. Thus it is proper to regard the amended applications as new applications filed subsequent to December 18, 1971. As such, these new applications should have been rejected for failure of appellants to timely file an allotment application. BLM's decisions of May 14, 1980, are properly affirmed, but the basis for such decisions is modified to conform to the language herein. Raymond Paneak, 19 IBLA 68 (1975); George Ondola, 17 IBLA 363 (1974).

[2] Pursuant to field reports which concluded that neither applicant had met the requirements of 43 CFR Part 2561 for an allotment on the land sought, and because there were evidences of mining activity on the lands, a mineral character examination of each parcel was made. The mining engineer reported that mining claims had existed on the lands since 1902, and that assay results from sampling on the lands showed very high values for both gold and silver. It was his conclusion, therefore, that the lands in each application are mineral in character.

On the basis of the mineral examination, the decisions of May 14, 1980, were issued, each stating the cause for rejection to be the mineral character of the land. Under the terms of the Act of May 17, 1906, supra, only vacant, unappropriated, and unreserved nonmineral land in Alaska may be allotted by the Secretary. 43 U.S.C. § 270-1 (1970).

Appellants each concede that there has been mining activity on parts of the land sought in her allotment application, but they argue

that the mineral character of land is established only when discovery of a valuable mineral deposit has been made, and they state that such discovery has not been made on either parcel. 1/ They err in their argument. Discovery of a valuable mineral deposit is the sine qua non for a valid mining claim, but the mineral character of the land may be established by inferential evidence. To establish the mineral character of lands, it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditure to that end; the mineral character of land may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable. United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); see also Southern Pacific Company, 20 IBLA 365 (1975); United States v. California, 55 I.D. 121 (1935). Lands containing mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money with a reasonable expectation of developing a paying mine are disposable only under the mining laws. Cataract Gold Mining Co., 43 L.D. 248 (1914).

If we were to assume for purposes of argument that appellants had filed timely applications for native allotments, due process would require, prior to the grant of a native allotment, that the mining claims presently on the subject lands be the subject of a private or government contest. The owners of these mining claims would be entitled to notice and an opportunity for a hearing on the issue of the validity of the claims. United States v. William A. McCall, 1 IBLA 115 (1970). Further assuming that the mining claims were invalidated for failure to show discovery of a valuable mineral deposit, the lands at issue would nevertheless retain their present status as mineral in character. This finding of mineral in character is alone sufficient to reject appellants' applications if otherwise acceptable. Appellants have alleged no facts to dispute this finding.

Appellants also complain that they were not given 60-day notices before the decisions rejecting their applications were issued, during which period they might submit further evidence in support of their applications. Although such notices have been issued in the past where adverse action was proposed to be taken because the applicant had not submitted sufficient evidence to show his or her entitlement to an allotment, such notices have not been issued where the rejection was for a cause outside the applicant's power to abate.

1/ In June 1974, appellants jointly requested BLM to declare the mining claims on the lands at issue to be null and void, asserting that the lands are nonmineral in character.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions being appealed are affirmed as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge